

Koh (Migration) [2020] AATA 3897 (21 September 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Eng Beng Koh

CASE NUMBER: 1817058

DIBP REFERENCE(S): CLF2012/128562 (A), CLF2015/17698 (B)

MEMBER: Ian Garnham

DATE: 21 September 2020

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Statement made on 21 September 2020 at 9:05am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – Federal Circuit Court remittal – spouse – genuine and continuing relationship – validly married, now divorced, but no documentation provided – financial, household and social aspects of relationship – nature of commitment – applicant has not lived with sponsor for two years – dob-in information – no response to tribunal’s invitation to comment on adverse issues – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 376
Migration Regulations 1994 (Cth), r 1.15A, Schedule 2, cl 801.211(c)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 March 2015 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 25 June 2012 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The Department (Department of Home Affairs (DHA)) delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.211 because they were not satisfied that the visa applicant and sponsor were in a genuine and continuing relationship.
4. The applicant appeared before the Tribunal on 13 February 2020 to give evidence and present arguments. The Tribunal also received oral evidence from his sponsor, by teleconference.
5. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
7. *Migration, previous reviews, and claimed relationship background of the parties:*
8. The 33yo visa applicant came to Australia from Malaysia on a subclass 976 Electronic Travel Authority (Visitor) visa in August 2005. The visa was valid for 3 months. The visa applicant was then unlawful for over 6 years until this visa application was lodged and he was granted a subclass 030 Bridging C visa in July 2012.
9. The 38yo sponsor was born in Vietnam and became an Australia citizen in May 2003.
10. The parties claim they met in June 2011 and began living together in January 2012 before committing to the relationship in May 2012. They married and lodged this visa application in June 2012.
11. In August 2013 the visa applicant was granted a subclass 820 Partner (Temporary) visa. In September 2014 DHA received *dob-in* information that the parties' relationship was contrived and that they lived separately and apart. DHA conducted a site investigation at the sponsor's house in November 2014.
12. Following the delegates decision, the visa applicant sought review by this tribunal, differently constituted. In July 2016 the AAT was not satisfied that the parties were in an exclusive or genuine and continuing relationship, and that they lived together on a permanent basis.¹
13. The visa applicant applied to the Federal Circuit Court of Australia for review of this decision. In June 2018 the matter was remitted to the AAT by consent because the previous tribunal

¹ 1503976 – 13 July 2016

failed to declare the existence section 376 certificates when some of the information contained in the documents protected by the certificates was relevant, or potentially relevant to the review.

14. At the hearing, the tribunal provided the visa applicant with copies of the certificates and opportunity to comment on the validity of the certificates. I advised the visa applicant that the tribunal considers that the certificates are valid. The broad contents of the protected documents and the relevant, adverse information was disclosed to the applicant. The tribunal also advised the visa applicant that I consider that all the relevant and adverse information contained in the protected documents has previously been disclosed to him; a number of times, as set out in the Decision Records of the delegate and previous tribunal.
15. On 18 August 2020 the tribunal formally wrote to the visa applicant (the letter) and gave him particulars of related, various new information discovered at the hearing about the claimed relationship. The visa applicant failed to respond to the tribunal's invitation to comment and provide further information about the particulars of the adverse issues raised therein.
16. Against this background, the initial issue in the present case is whether the parties are in a spouse or de facto relationship that satisfies the required criteria to meet subclause 801.221(c) of the Regulations.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. SPOUSE/DEFACTO (cl.801.221(2))

Whether the parties are in a spouse or de facto relationship?

18. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. A certified copy of the parties' Certificate of Marriage was provided with the visa application. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
21. At the hearing the parties said that they are now divorced.

22. In the letter the tribunal sought comment about this new information that was provided by the parties:

23. *You and your sponsor said that you are now divorced but that you are maintaining a de facto relationship. You both said you were unsure when you became divorced but thought it was about one year ago. You said that you became divorced because you were constantly fighting about finances and your visa issues. To obtain a divorce in Australia you must have been separated from your spouse for at least 12 months and the parties must provide sworn evidence that you have separated.*

24. In the letter the tribunal also requested a copy of the parties' divorce applications and divorce certificate. As no further information was provided, the tribunal continued to assess the relationship against the spousal requirements of the Regulations.

Are the other requirements for a spouse relationship met?

25. *Financial aspects of the relationship:*

26. The delegate concluded that a joint bank statement for the period 17 August 2013 to 14 February 2014 did not demonstrate that the account was being used for the parties' day to day expenses or the pooling of financial resources. At this time; the delegate was not satisfied that the information provided supported claims that the parties, *...maintain financial resources that are consistent with a couple who have been in a spousal relationship for more than 2 years.*
27. The previous tribunal considered the joint bank account transactions for the same period and also for the period; November 2012 and February 2013. The previous tribunal also considered that the joint account was; *...set up for the sole purpose of meeting the requirements of Regulation 1.15A.*²
28. The previous tribunal also considered further evidence related to the financial affairs of the parties, including; incomplete taxation material, details of the sponsor's family assistance package from Centrelink and the Contract of Sale for the sponsor's house. The tribunal found the taxation material to be unconvincing because it did not demonstrate that the parties were presenting themselves as a couple for taxation purposes. Similarly, the tribunal held concerns that the sponsor's family assistance package from Centrelink³, which shows a combined income of \$85,000 was associated with probable payments made to the sponsor through a contract organised by Jen (discussed below).⁴ The previous tribunal was also not convinced that the visa applicant has any legal obligation to the sponsor in respect of this asset, or that he has actually invested in the asset. This was a contract of sale dated 20 July 2015 that included the names of the sponsor and visa applicant as purchasers.
29. At the hearing the parties said that they do share a major asset, in that, they claim they saved together for the deposit to purchase the house where the sponsor and her 15yo daughter now live. The sponsor could not recall how much their house cost, but it may have been around \$340,000. The sponsor also could not remember how much her mortgage payments are, but after prompting said it may be around \$1,500/month.
30. In the letter I requested comment from the visa applicant in respect to the particulars of this information provided at the hearing:

² 1503976 – at para 47

³At FF: 215 (DHA)

⁴1503976 – at para 50

31. *You and your sponsor said that you jointly purchased the house where she now lives with her daughter. However, you are not recorded as a joint owner on the title because the bank would not allow you to do so. No evidence has been provided that you have any equitable ownership in this property and at the hearing you and your sponsor said that aside from the house you have no joint assets.*

32. At the hearing the parties said they no longer have a joint bank account and the sponsor said it was closed when they separated. The sponsor said that the visa applicant does not contribute to any of her household bills and she does not give him any money when she sees him. The sponsor also said that the visa applicant sometimes gives her money when he has it, but that she does not ask him for money because the visa applicant does not have work rights.
33. In the letter, I also invited the visa applicant to provide the following financial information to the tribunal; copies of their tax returns (showing whether the relationship has been declared) for the years 2013 – 2020 inclusive; and any information that demonstrates the parties' joint ownership of assets.
34. The parties have not demonstrated joint ownership of assets or liabilities. No evidence of legal obligations that are owed to the other party have been presented to the tribunal. By their own evidence given at the hearing, the visa applicant and sponsor do not pool their financial resources or share any day-to-day household expenses.

35. Nature of the household:

36. In their decision record the delegate noted that during the interview with the sponsor conducted during the site visit; she said the visa applicant was working on a farm at Mildura and had left home 2 days ago. During the interview DHA contacted the visa applicant and he said that he did not understand English. The sponsor also said he had been sleeping and the interviewer recorded that a female voice could be heard in the background. The interviewer engaged an interpreter and called the visa applicant back, but the call was unanswered. However, while the interview with the sponsor was continuing the visa applicant called his sponsor and said he had been contacted by DHA. Furthermore, when the interviewer called back the phone number that the visa applicant had used to contact his sponsor the phone was answered by a woman calling herself Caddy. In response to this information the visa applicant provided Optus phone bills for a male person that appeared to be the same number used by DHA to attempt to call the visa applicant back. The visa applicant claimed he had borrowed this used this phone to contact his sponsor because he had exceeded his outgoing calls at the time. However, this does not explain why the visa applicant did not take the call when the interviewer attempted to call him back.
37. The delegate concluded that this information supported the dob-in information that the visa applicant was actually living with his girlfriend at that time. Whilst not relying on this information, in making its decision the previous tribunal was also not satisfied that the visa applicant was living with his sponsor at the time of the interview⁵.
38. I also note that before the previous tribunal the visa applicant provided a letter dated 24 May 2016 from the Principal of the visa applicant's daughter's school, that states that the visa applicant is responsible for picking her up from school every day. This indicates to me that for some period the visa applicant was responsible for some of the care and support of the visa applicant's child. However, I also note that this occurred after the visa applicant living apart from the sponsor had been exposed by DHA and that the parties may well have changed their behaviour due to the exposure created by the investigation and the delegate's decision.

⁵1503976 – at para 53

39. At the hearing the visa applicant said he has not lived with the sponsor and her daughter for about 2 years. However, he did say he had spent the night before the hearing at her place. The parties also independently told the tribunal that the previous time he had stayed at her house was for one night a few weekends beforehand during Chinese New Year celebrations. Because of this information I accept that the sponsor and visa applicant do maintain at least some sort of irregular contact. Nevertheless, because of my concerns with respect to the visa applicant's knowledge of the address of the property in which the sponsor lives; his providing DHA with an address of a friend's relative in Melbourne, rather than the sponsor's address and the parties' evidence to the tribunal that they no longer live together, I provided the visa applicant with an opportunity to attempt to explain their evidence provided at the hearing:

40. *The tribunal was unable to contact you in December 2019 at the phone numbers and address you provided when the previous review was conducted. After contacting DHA a new address was provided that you claim was how you received the tribunal's invitation to attend the hearing on 31 February 2020. At the tribunal you said that you received the invitation 4 days before the hearing because the mailing address you had provided to DHA is the address of one of your friend's father in Melbourne. The fact that you have provided a different Melbourne address to DHA, to the address of your sponsor indicates that you are not in a genuine and continuing relationship with your sponsor.*

41. *When I asked you where your sponsor was now living you were unable to provide the address or even the suburb that she lives in. You said this is because you do not understand English and that you know how to get to her place but do not know the address. While I appreciate that English is not your native language I note you have resided in Australia since 2005 I consider it is unlikely that you have ever lived at the home of your sponsor for any significant period because of your lack of knowledge of the actual address.*

42. *You also advised me at the hearing that you have not lived with your wife for 2 years. Your sponsor said that you visit her once or twice per month on weekends when you are in Melbourne. You said that you now live in Kerang and Robinvale with friends and that they give you food for helping them out. You also said that your sponsor cooks food for you when you visit her.*

43. I also requested any information the visa applicant could provide that demonstrates he has any caring responsibilities for the sponsor's child.

44. The parties have elected not to respond to the above particulars and the request for further information. The current evidence before the tribunal, provided by the parties, is that they do not share a household and have permanently not done so for at least 2 years. It follows that their living arrangements are independent of one another. This means they do not share housework and the visa applicant does not have any responsibility for the care and support of the visa applicant's child.

45. Social aspects of the relationship:

46. During the site visit interview with DHA the sponsor is recorded as saying that she did not know if the visa applicant had any female friends because she did not know any of his friends because she did not go out with him and his Malaysian friends as she does not understand the language. This was against a background where the dob-in information claimed that the visa applicant was living with his girlfriend apart from the sponsor. In addition, the sponsor's face book information included romantic posts with another person who the sponsor admitted being close friends with. Following analysis of the sponsor's phone messages at the site visit it was recorded that she had recently been to dinner with a different male person and there were several phone messages between them. At the site visit the sponsor was recorded as stating that; ...*at the start she was not* [in a relationship

with the visa applicant] *but that now she wants to be in a relationship with* [the visa applicant].

47. Collectively all of this information led the delegate to conclude that the parties may well have been in relationships with different people. Following extensive exploration of these issues by the previous tribunal and in particular, analysis of the sponsor's social media content the tribunal was not persuaded that the parties do not lead separate social lives.
48. With respect to this information, at the hearing the visa applicant said that when this information was exposed by DHA he became upset with the sponsor, but that after a period, the parties reconciled and the sponsor ceased seeing these persons. Whereas the sponsor said that the views drawn by the delegate and the previous tribunal were incorrect and if her face book pages had been examined thoroughly references to the sponsor would have been found.
49. At the hearing the sponsor said she does not know where the visa applicant goes because he does not tell her where he now lives and goes with his friends. The sponsor said that they do not go out socially as a couple but that the visa applicant just comes and visits her and her daughter at their home.
50. In the letter, the tribunal requested any further information that; ... *demonstrates you are in a genuine and ongoing relationship with your ex-wife since 2016 to present*. No information was provided.
51. The information before the tribunal is that the parties do not represent themselves to other people as being married to each other, indeed they now claim they are no longer married. The tribunal has been provided no recent information about the opinion of friends and acquaintances about the nature of the relationship. The sponsor said that she does not even know who the friends and acquaintances of the visa applicant are. The parties have provided no information about the basis on which they plan and undertake joint social activities. In fact, their own evidence is that they do not do so.
52. *Nature of persons' commitment to each other:*
53. The parties now seek to claim that they have had a relationship for eight years. At the hearing both were unable to provide any examples of where they had provided emotional support and companionship to one another, other than stating that the visa applicant's daughter considers the visa applicant to be her father, and the visa applicant treats her as his daughter.
54. The visa applicant said that they separated because they were fighting all the time about finances and his visa issues. It makes no sense to the tribunal that, if they were in a genuine and continuing relationship, he would not stay in the family home to support the sponsor by caring for her daughter and providing support to his sponsor while he is unable to work, rather than leaving to live with friends.
55. The tribunal also discussed the text messages between Jen and the sponsor that indicate that the sponsor was receiving money based on acting as sponsor in the visa application of the visa applicant. Based on the responses provided at the hearing and the documentary evidence I am not satisfied that the logical conclusions of the delegate and the previous tribunal were incorrect. They both concluded that the likelihood is that the relationship was contrived and that the sponsor received money in exchange for sponsoring the visa applicant so that he could achieve a permanent visa to remain in Australia. The response that was provided to the previous tribunal and at the hearing was that the money refers to a debt owed by Jen to the visa applicant. When the contents of the text messages and when

the communication occurred are considered, it is fanciful to suggest that the explanation provided is plausible.

56. In the tribunal's letter to the visa applicant I stressed the importance of the information in the following terms:

57. *This information is relevant to the review because if I am not satisfied that you, have a mutual commitment to a shared life together to the exclusion of all others; and your relationship is genuine and continuing; and, that you live together or that you do not live separately and apart on a permanent basis; I will not be able to find that you are de facto partners as required by the legislation.*

58. *All of the above information strongly suggests that you are not in a relationship of de facto partners as required by the legislation.*

59. *If I rely on this information in making my decision, I may affirm the decision under review.*

60. The parties' failure to respond to the letter is indicative of their failure to address the plethora of adverse information collected throughout the investigation of their claimed relationship. The parties failure to respond is a further indicator that there is no commitment to each other and they are not in a genuine and continuing relationship.

61. Conclusion:

62. I have reviewed all of the information and documents before me; including the DHA files, the previous tribunal hearing and file, and the oral evidence of the parties provided at the hearing. Having done so, I am not satisfied that the parties have a mutual commitment to shared life to the exclusion of others; or that they have a genuine and continuing relationship, or that they live together.
63. Given these findings the tribunal is not satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore, the applicant does not meet cl.801.221(2)(c).
64. Furthermore, the applicant has not claimed, and there is no evidence before the Tribunal, that the applicant meets the alternative criteria in cl.801.221(2A), (3), (4), (5) or (6).
65. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

66.

67.

DECISION

68. The Tribunal affirms the decision not to grant the applicant a Partner (Residence) (Class BS) visa.

Ian Garnham
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).